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THE COMPATIBILITY OF VAGRANCY LAWS WITH HUMAN RIGHTS INSTRUMENTS IN AFRICA

*by Fabian Kopp**

On December 4, 2020, the African Court on Human and Peoples' Rights (AfCHPR) issued an advisory opinion in response to the Pan African Lawyers Union's (PALU) question on whether vagrancy laws in the African Union member states comport with the African Charter on Human and Peoples' Rights (the Charter), the African Charter on the Rights and Welfare of the Child (the Children's Rights Charter), and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women (the Women's Rights Protocol).¹ The advisory opinion emphasizes that the obligations present in regional human rights instruments extend human rights to people no matter their socioeconomic status, and it highlights the traditional shortcomings of such instruments, namely through the lack of enforcement mechanisms.²

Vagrancy laws broadly target offences such as begging, idleness, being without a fixed abode, being a reputed thief, and being a rogue—essentially criminalizing an individual's manner of living.³ The

individuals whose rights are at risk are people experiencing homelessness, unemployment, poverty, or otherwise subject to arbitrary policing.⁴ Vagrancy is criminalized in at least eighteen African countries, another eight countries outlaw being a “rogue” or a “vagabond,” and three more countries in the continent have laws against idle and disorderly people.⁵

Vagrancy laws are often designed to curtail the mobility of people, criminalize begging, reduce the costs of looking after the poor, and prevent property crimes.⁶ Furthermore, vagrancy laws are often the vestiges of colonial criminal codes.⁷ Recent scholarship shows that former French and British colonies retain varying percentages of colonial criminal codes as law in post-colonial states, although action for reform and revision has taken place since 1955 until today.⁸

The Court holds that vagrancy laws are contrary to Articles 2, 3, 5, 6, 7, 12, and 18 of the Charter, Articles 3, 4(1), and 17 of the Children's Rights Charter, and Article 24 of the Women's Rights Protocol.⁹ In sum, the Court reasons that the broad interpretation and arbitrary enforcement of vagrancy laws readily allows for discrimination before the law; prevents the equal protection of the law; violates promises of dignity, liberty, and a fair trial; restricts the ability of people to freely move; breaks apart families; infringes upon the best interests of the child; and provides

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¹ Request for Advisory Opinion by the Pan African Lawyers Union (PALU) on the Compatibility of Vagrancy Laws with the African Charter on Human and Peoples' Rights and Other Human Rights Instruments Applicable in Africa, No. 001/2018, Advisory Opinion, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.], ¶ 5 (Dec. 4, 2020) [hereinafter Advisory Opinion], <https://www.african-court.org/cpmt/storage/app/uploads/public/5fd0c6/49b/5fd0c649b6658574074462.pdf>.

² *Id.* ¶ 155.

³ *Id.* ¶ 58; *Vagrant*, BLACK'S LAW DICTIONARY (11th ed. 2019).

⁴ Advisory Opinion ¶ 58.

⁵ *Id.* ¶ 60.

⁶ *Id.* ¶ 59.

⁷ Simon Coldham, *Criminal Justice Policies in Commonwealth Africa: Trends and Prospects*, 44 J. AFR. L. 218, 223 (2000).

⁸ See, e.g., Maya Berinzon & Ryan C. Briggs, *Legal Families Without the Laws: The Fading of Colonial Law in French West Africa*, 64 AM. J. COMPAR. L. 329, 361 (2016); S. Afr. Litig. Ctr. & Ctr. for Hum. Rts. Educ., Advice & Assistance, *No Justice for the Poor: A Preliminary Study of the Law and Practice Relating to Arrests for Nuisance-Related Offences in Blantyre, Malawi* 1, 15-28 (2013), <https://www.southernafricalitigationcentre.org/wp-content/uploads/2017/08/No-Justice-for-the-Poor-A-Preliminary-Study-of-the-Law-and-Practice-Relating-to-Arrests-for-Nuisance-Related-Offences-in-Blantyre-Malawi.pdf>.

⁹ Advisory Opinion ¶ 155.

warrantless arrests of women who are suspected of being sex workers.¹⁰ Article 1 of each human rights instrument provides that states should take necessary steps to provide the full application of rights recognized within each document.¹¹ Therefore, states have an obligation to amend or repeal vagrancy laws to bring them into conformity with each instrument.¹²

PALU's request for the advisory opinion from the Court comes as several states are questioning the purpose of and beginning to repeal their vagrancy laws.¹³ For example, the High Court of Malawi ruled that the offence of being a "rogue and vagabond" was unconstitutional.¹⁴ The Community Court of Justice of the Economic Community of West African States held that the arbitrary detention of women labelled prostitutes violated the women's human rights under the Charter, the Women's Rights Protocol, and various international human rights instruments.¹⁵ The advisory opinion from the Court and other courts' decisions within the African Union point to the continuing confrontation with vagrancy laws, but work remains to be done to ensure people's human rights are supported no matter their socioeconomic status. Due to the limits of the Court's enforcement authority, states are the actors responsible for bringing laws into compliance with human rights instruments. Time is of the essence; as states take time to amend or repeal their existing vagrancy laws, people will continue to suffer only due to the manner in which they live.

¹⁰ *Id.* ¶¶ 75, 80, 87, 94, 102, 107, 120, 123, 128, 140.

¹¹ *Id.* ¶ 153.

¹² *Id.* ¶ 154.

¹³ *Id.* ¶ 61.

¹⁴ *Gwanda v S*, [2017] MWHC 23 (Malawi), <https://malawilii.org/mw/judgment/high-court-general-division/2017/23>.

¹⁵ *Njemanze v. Nigeria*, No. ECW/CCJ/JUD/08/17, Judgment, Community Court of Justice of the Economic Community of West African States [ECOWAS], 41-42 (Oct. 12, 2017), http://www.courtecawas.org/wp-content/uploads/2019/01/ECW_CCJ_JUD_08_17-1.pdf.